

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

Application by BellSouth Corporation, )  
BellSouth Telecommunications, Inc., )  
and BellSouth Long Distance, Inc. for ) Docket No. CC-97-208  
Provision of In-Region, InterLATA )  
Service in South Carolina )

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**COMMENTS OF INTERMEDIA COMMUNICATIONS INC.  
IN OPPOSITION TO THE REQUEST FOR  
IN-REGION, INTERLATA RELIEF**

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## SUMMARY

As a result of its direct experience with BellSouth Telecommunications, Inc. ("BellSouth") in South Carolina and other states, Intermedia Communications Inc. ("Intermedia") strongly believes that BellSouth's application for authority to provide in-region, interLATA service in South Carolina is premature. Intermedia negotiated an interconnection agreement with BellSouth in June 1996, and in September 1996, BellSouth committed in writing to provide Intermedia with unbundled digital loops that are critical to Intermedia's Frame Relay service. Although BellSouth promised to provide these loops over a year ago, it still has not done so in South Carolina or any other state. Moreover, even in the provision of relatively simple resale services, the services BellSouth provides to Intermedia are inferior to the services BellSouth provides to its own retail customers.

As Intermedia describes in detail in its comments and as summarized here, BellSouth falls short of its statutory obligations to provide interconnection, unbundled network elements ("UNEs"), resale, and reciprocal compensation in the following ways:

- BellSouth simply does not have systems in place to accept and process service orders from competitive carriers in a reasonable manner. This applies equally to simple resale services, as well as to more complex unbundled loops.
  - Throughout the BellSouth service region, Intermedia has placed 552 service orders for resale between August 9 and October 9, 1997. Of these, 204 orders--37%--have not even been acknowledged. This includes orders dating as far back as August 9, 1997.
  - In South Carolina, Intermedia submitted orders in the same timeframe as above for 16 resale services. Of these, 4 of the orders--25%--have not even been acknowledged.
  - Intermedia has received 1 unbundled loop from BellSouth (a DS1 circuit). It took BellSouth 6 weeks to deliver the ordered circuit, even though BellSouth provides identical DS1 service to its retail customers in 1-2 weeks.
  - Despite assurances from BellSouth that Intermedia's subsequent orders for DS1 would be processed more efficiently and in a timely manner, BellSouth has not done so. Instead, Intermedia is experiencing the same problems it encountered when it placed its first DS1 order in May 1997, which indicates that the *status*

*quo* has not changed. Thus, Intermedia's actual experience contradicts BellSouth's recent assertions that the problems associated with its operations support systems ("OSS") and other matters have been rectified.

- In statements before the Public Service Commissions of North Carolina, Florida, and Alabama, BellSouth witnesses have stated BellSouth's intention to renege on its interconnection agreements with Intermedia and other carriers.
  - In contravention of its written commitments to Intermedia, BellSouth witnesses indicated that BellSouth is not legally obligated to provide data circuits critical to Intermedia's frame relay service as unbundled network elements.
  - In contravention of its interconnection agreement with Intermedia, BellSouth has advised Intermedia that it will not compensate Intermedia for the transport and termination of Internet-bound local traffic.
- BellSouth has not demonstrated that it provides nondiscriminatory access to its operations support systems--a duty imposed upon BellSouth by the network unbundling provisions of Section 251(c)(3) and the resale provisions of Section 251(c)(4) of the Act.
  - The OSS access provided by BellSouth to competing providers of telephone exchange service is not equivalent to that it provides to itself in terms of quality, accuracy, and timeliness. BellSouth has not demonstrated otherwise through performance reports or similar evidence of parity.
  - BellSouth's own commissioned study unequivocally demonstrates that BellSouth's ordering and related systems provide inferior services to competing carriers.
  - BellSouth has already publicly acknowledged that it does not meet the OSS requirements enunciated by the Commission. Indeed, BellSouth fails to meet virtually all of the OSS criteria articulated by the Commission for Section 271 authorization.
  - BellSouth has no formal processes in place for informing competing carriers of changes in its OSS interfaces.

- BellSouth is arguing to the Commission and several State commissions that it does not need to show that it has implemented interconnection agreements with competitors, but that it can obtain in-region, interLATA authority simply by filing a Statement of Generally Available Terms and Conditions ("SGATC") that promises to provide interconnection and unbundled elements.
  - As described above and elsewhere in this document, BellSouth is not able to provide interconnection and unbundled network elements to actual competitors. Without a demonstrated ability to provide these services and elements, its SGATC is an empty paper promise.
  - As a matter of law and plain common sense, BellSouth must demonstrate its ability to provide services and unbundled network elements to competitors in a reasonable, efficient and timely manner. Grant of in-region, interLATA authority is the only effective incentive BellSouth has to provide such service to its competitors. For this reason, the Commission must reject BellSouth's application to provide in-region, interLATA services in South Carolina at this time.

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Intermedia Communications Inc.  
BellSouth Telecommunications, Inc.  
South Carolina

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To the Commission:

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**INTERMEDIA COMMUNICATIONS INC.** ("Intermedia"), by its undersigned counsel and pursuant to the Commission's public notice, dated September 30, 1997,<sup>1</sup> hereby respectfully submits its comments in opposition to BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc.'s request for in-region, interLATA authority under Section 271<sup>2</sup> of the federal Telecommunications Act of 1996 (the "1996 Act"). Intermedia submits that BellSouth Telecommunications, Inc.

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<sup>1</sup> Public Notice, DA No. 97-2112 (Sept. 30, 1997).

<sup>2</sup> 47 U.S.C. § 271.



("BellSouth") does not meet the threshold requirements of either Section 271(c)(1)(A)<sup>3</sup> ("Track A") or Section 271(c)(1)(B)<sup>4</sup> ("Track B") and, moreover, fails to demonstrate, by preponderance of the evidence,<sup>5</sup> that it meets each and every requirement of Section 271(c)(2)(B)<sup>6</sup> (hereinafter, the "Competitive Checklist").

## I. BACKGROUND AND INTRODUCTION

Intermedia is one of the country's largest and fastest growing competitive local exchange carriers ("CLEC"), providing a full range of local and long distance services to business and government end-user customers, long distance carriers, information service providers, resellers, and wireless carriers. Intermedia is known for its ability to package customized, "no assembly required" solutions to meet each customer's specific requirements. Intermedia provides voice, video, and data services, including frame relay and Internet access, to customer locations in over 1,200 cities nationwide and internationally--offering seamless end-to-end connectivity virtually anywhere in the world.

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<sup>3</sup> 47 U.S.C. § 271(c)(1)(A).

<sup>4</sup> 47 U.S.C. § 271(c)(1)(B).

<sup>5</sup> The Commission previously has concluded that the Section 271 applicant must present a *prima facie* case in its application that all of the requirements of Section 271 have been met. The Commission has found that the "preponderance of the evidence" standard in most administrative and civil proceedings is the appropriate standard for evaluating a BOC Section 271 application. The Commission has interpreted the "preponderance of the evidence" standard to mean "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, CC Docket No. 97-137 (rel. Aug. 19, 1997) (*Ameritech-Michigan Order*).

<sup>6</sup> 47 U.S.C. § 271(c)(2)(B).

Intermedia is authorized to provide intrastate interexchange and competitive local exchange services in South Carolina, and has already commenced operations in that State. In South Carolina, Intermedia has approximately 400 resold access lines; four Cascade data switches located in Columbia, Greenville, Florence, and Charleston; and approximately 125 data circuits. Intermedia plans to deploy a Nortel DMS 500 voice switch in South Carolina during the third quarter of 1998.

Intermedia negotiated an interconnection agreement with BellSouth on June 21, 1996, encompassing BellSouth's nine-state territory, including South Carolina (a copy of the Intermedia-BellSouth interconnection agreement is attached hereto and incorporated herein by reference as **EXHIBIT 1**). That non-arbitrated interconnection agreement was approved by the South Carolina Public Service Commission ("South Carolina PSC") pursuant to Section 252(e)<sup>7</sup> of the 1996 Act. The interconnection agreement provides for, among other things, interconnection, access to unbundled network elements, resale of BellSouth's retail services, and mutual compensation for the transport and termination of local traffic. Moreover, the interconnection agreement contemplates the provision of unbundled network elements and services necessary to provide data services--a major component of Intermedia's business strategy.

As a CLEC whose network design, service mix, and customer base focus heavily on data services, as well as traditional voice services, Intermedia has requested BellSouth services and unbundled network elements that are critical to the provision of digital

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<sup>7</sup> 47 U.S.C. § 252(e).

data services.<sup>8</sup> These applications were the focus of Intermedia's interconnection agreement with BellSouth and Intermedia's initial requests for unbundled data circuits some fifteen months ago. As Intermedia explains in these comments, despite extensive and continued discussions and correspondence with BellSouth personnel, BellSouth has yet to provide the requested unbundled digital loops critical to Intermedia's provision of data services. Equally important, BellSouth has conveniently left out from its SGATC unbundled 56/64 kbps data loops that Intermedia previously has requested and BellSouth has committed, in writing, to provide. Recent declarations, under oath, by BellSouth witnesses before State public utility commissions also provide a very disturbing indication that BellSouth may be reneging on its commitment to Intermedia to provide unbundled data loops altogether.

This and other information--all first-hand knowledge obtained through Intermedia's experience with BellSouth--abundantly demonstrate that BellSouth's proposed entry into the South Carolina in-region, interLATA market at this time is premature. Such approval at this time would give BellSouth *carte blanche* to abandon its obligations and commitments to Intermedia, and would eliminate the single greatest incentive for BellSouth to implement in good faith its existing interconnection agreements with CLECs.

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<sup>8</sup> Today, the majority of circuits provided by BellSouth and most new entrants consist of voice telephony services over analog facilities. In the next few years, however, this will change--increasingly complex services, from a combination of voice and data to full motion video, will be demanded by both business and residential customers. The digital network that Intermedia is building today will be the backbone architecture over which these services--as well as plain old telephone service ("POTS")--will be provided.

**II. CONTRARY TO BELL SOUTH'S ASSERTION, BELL SOUTH MAY NOT PROCEED UNDER EITHER TRACK A OR TRACK B AT THIS TIME.<sup>9</sup>**

**A. The Track A/Track B Dichotomy.**

The 1996 Act provides two ways for Bell Operating Company ("BOC") entry into the in-region, interLATA market: entry through Section 271(c)(1)(A) or Track A, and entry through Section 271(c)(1)(B) or Track B. In order to meet the requirements of Track A, a BOC must demonstrate that "it is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers," and the telephone exchange service is being offered by the competing providers "either exclusively over their own . . . facilities or predominantly over their own . . . facilities in combination with . . . resale . . . ." <sup>10</sup> Section 271(c)(1)(B), on the other hand, permits a BOC to seek entry under Track B if (1) "no such provider" has requested the access and interconnection described in Section 271(c)(1)(A) three months prior to the date on which a BOC may apply to the Commission for in-region, interLATA authority, and (2) the BOC's Statement of Generally Available Terms and Conditions has been approved or permitted to take effect by the relevant state regulatory commission. <sup>11</sup> As discussed below, the plain language of the 1996

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<sup>9</sup> In its brief, BellSouth asserts that it is entitled to proceed under Track B and, moreover, that it may well proceed under Track A. Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, at 4-17 (Sept. 30, 1997) ("Supporting Brief").

<sup>10</sup> 47 U.S.C. § 271(c)(1)(A).

<sup>11</sup> 47 U.S.C. § 271(c)(1)(B).

Act and the Commission's interpretation of the statute, make clear that BellSouth is precluded from seeking 271 authorization via Track B as a matter of law.

**B. BellSouth is Ineligible for Section 271 Authorization Under Track B.**

The phrase "no such provider," as used in Section 271(c)(1)(B) refers to a potential competing provider of the telephone exchange service described in Section 271(c)(1)(A). This interpretation comports with the Commission's recent decision rejecting SBC Communications, Inc.'s Section 271 application.<sup>12</sup> As the Commission found:

Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a prospective competing provider of telephone exchange service, subject to the exception in section 271(c)(1)(B) . . . . Thus, we interpret the words "such provider" as used in section 271(c)(1)(B) to refer to a potential competing provider of the telephone exchange service described in section 271(c)(1)(A). We find it reasonable and consistent with the overall scheme of section 271 to interpret Congress' use of the words "such provider" in section 271(c)(1)(B) to include a potential competing provider. This interpretation is the more natural reading of the statute because . . . it retains the meaning of the term "request." . . . To give full effect to the term "request," we therefore interpret the words "such provider" to mean any such potential provider that has requested access and interconnection.<sup>13</sup>

Thus, contrary to BellSouth's assertion, BellSouth does not meet the requirements of Section 271(c)(1)(B) because several "qualifying requests" for access and interconnection have been submitted to BellSouth by competing providers of telephone exchange service in South Carolina. In fact, Intermedia has such an interconnection

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<sup>12</sup> *Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, CC Docket No. 97-121 (rel. June 26, 1997) (*SBC-Oklahoma Order*).

<sup>13</sup> *SBC-Oklahoma Order*, at ¶ 34.

agreement with BellSouth, as do AT&T, MCI, and numerous other interexchange carriers and CLECs. Such interconnection agreements, if fully implemented, would result in the provision of telephone exchange service to residential and business subscribers in the manner described in Section 271(c)(1)(A). As long as these qualifying requests remain unsatisfied--and Intermedia submits that the record in this proceeding will clearly demonstrate that these qualifying requests have not been fully satisfied by BellSouth--the requirements of Section 271(c)(1)(A) would remain unsatisfied, and BellSouth would remain foreclosed from seeking in-region, interLATA authority under Track B.<sup>14</sup>

BellSouth argues that Track B is appropriate because, even if the pending requests for interconnection were fully implemented, they would not result in the provision of facilities-based residential and business local exchange services. This assertion is baseless and has no support in the record. That the South Carolina PSC has "certified," as BellSouth states, that "none of [BellSouth's] potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residential customers in South Carolina,"<sup>15</sup> is not determinative of the issue. The Commission previously has rejected a BOC's suggestion that a State commission's finding under Section 271 is dispositive:

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<sup>14</sup> See *SBC-Oklahoma Order*, at ¶ 57.

<sup>15</sup> Supporting Brief, at 8 (quoting *Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market, Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. 97-101-C, Order No. 97-640 (South Carolina Public Service Commission, July 31, 1997).

Although SBC emphasizes that the Oklahoma Commission "concluded that [SBC] satisfies the requirements of subsection 271(c)(1)(A) because Brooks Fiber serves both business and residential customers . . . , we find that the Oklahoma Commission's determination on this issue is not dispositive. Section 271 requires us to consult with the Oklahoma Commission "in order to verify the compliance of [SBC] with the requirements of [section 271(c)]" before we make any determination on SBC's application under section 271(d). At the same time, as the expert agency charged with implementing section 271, we are required to make an independent determination of the meaning of statutory terms in section 271.<sup>16</sup>

**III. EVEN IF BELLSOUTH CAN PROCEED UNDER SECTION 271(c)(1)(B) --WHICH IT CANNOT--THE COMMISSION MUST REJECT BELLSOUTH'S APPLICATION BECAUSE OF FATAL FLAWS IN ITS SGATC.**

Even if BellSouth can proceed under Track B--and the record in this proceeding shows that BellSouth is precluded from doing so--BellSouth's SGATC fails to meet the pricing standards and other requirements of the 1996 Act.

**A. BellSouth's SGATC Fails to Comply with the Pricing Standards of the 1996 Act.**

Section 271(c)(2)(B)(ii) of the 1996 Act requires a BOC applying for in-region interLATA authority under Section 271 of the 1996 Act to provide access to unbundled network elements. Section 252(d)(1) of the 1996 Act sets forth the pricing standards that apply to unbundled network elements. In particular, Section 252(d)(1) provides:

(1) INTERCONNECTION AND NETWORK ELEMENTS CHARGES.--*Determinations by a State commission* of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

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<sup>16</sup>

*SBC-Oklahoma Order*, at ¶ 15 (quotes in original).

(a) shall be--

(i) based on the cost (determined without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(b) may include a reasonable profit.<sup>17</sup>

The rates provided in BellSouth's SGATC fails to meet the pricing standards required by the 1996 Act. BellSouth's SGATC incorporates rates from several sources. Where a rate was arbitrated, rates prescribed by the South Carolina PSC were incorporated into the SGATC. Where a rate was not arbitrated, BellSouth relied on a number of sources, including existing tariff rates from South Carolina tariffs, out-of-state tariffs, and federal tariffs, and rates used in interconnection agreements that BellSouth voluntarily negotiated with other CLECs.<sup>18</sup> As discussed below, rates derived from tariffs or from negotiated agreements do not comply with the pricing standards of the 1996 Act.

As to those rates which did not come from the South Carolina PSC's arbitration proceeding, but rather were based on tariffs, these are inconsistent with the pricing standards of the 1996 Act. The South Carolina PSC has not found these rates to be cost-based. Indeed, BellSouth has not provided cost data to support its assertion that the proposed rates are based on costs. Moreover, rates culled from existing tariffs are not

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<sup>17</sup> 47 U.S.C. § 252(d)(1) (emphasis added).

<sup>18</sup> SC PSC Compliance Order, at 53.



necessarily based on any costing methodology that complies with the costing requirements of the 1996 Act.

With respect to those rates which came from negotiated interconnection agreements and which were never arbitrated, these rates were never subject to the South Carolina PSC review. Under Section 252(e)(2)(B), the relevant State commission may reject arbitrated agreements if they do not meet the requirements of Section 251, including the Commission regulations promulgated thereunder, or the standards set forth in Section 252(d). In contrast, rates in negotiated interconnection agreements are exempt from 252(d) review. Indeed, Section 252(a)(1) permits an ILEC to negotiate rates which do not comply with the pricing standards of Section 252(d). Because BellSouth chooses to use rates in its SGATC that have been negotiated and, by definition have not been found to comply with the costing standards of the 1996 Act, BellSouth bears the burden of showing that those negotiated rates comply with Section 252(d). BellSouth has not submitted any cost studies in the South Carolina proceeding, nor has the South Carolina PSC evaluated those rates according to the pricing standards articulated in Section 252(d). Absent such a showing, the Commission cannot find that BellSouth complies with Section 271(c)(2)(B)(ii).

In addition to the fact that the rates proposed by BellSouth have not been found to be cost-based, some of the network elements included in the SGATC do not even have rates associated with them. For example, there are no recurring and nonrecurring rates for loop distribution even though the SGATC lists loop distribution as an unbundled network element. Instead, the rates for loop distribution are subject to a bona fide request process ("BFR"). The BFR process is merely a negotiating tool. Section 252(d)(1) clearly requires

that the rates for UNEs must be based on cost. Because the SGATC does not contain rates for certain elements, and instead are subject to a BFR, it is impossible to determine whether the rates ultimately arrived in the BFR process will be consistent with the pricing standards of the 1996 Act. Similarly, the BFR process is an open invitation to price the unbundled network elements well in excess of cost.

Finally, BellSouth witnesses have testified in other State Section 271 proceedings, that a competing carrier could negotiate with BellSouth to combine unbundled network elements, in which case a "glue" charge would apply.<sup>19</sup> This glue charge is nowhere listed in the SGATC. Because this glue charge would be subject to negotiation, this is another open invitation to charge well in excess of cost.

Thus, on pricing issues alone, the Commission must find that BellSouth's SGATC does not meet the requirements of the 1996 Act.

**B. BellSouth's SGATC Fails to Comply with Other Requirements Imposed by the 1996 Act.**

As Intermedia discusses at length below, BellSouth has demonstrated an inability to comply with the 1996 Act's requirements regarding OSS access, resale, access to unbundled network elements, interconnection, and other statutory obligations. These deficiencies demonstrate that the services and UNEs listed in BellSouth's SGATC are not reasonably and practically available and, thus, further compel rejection of BellSouth's application to provide in-region, interLATA services in South Carolina.

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<sup>19</sup> Scheye Testimony, Florida Hearing Transcripts, at 744.

**IV. RECENT ACTUAL EXPERIENCE OF INTERMEDIA AND OTHER CLECs DEMONSTRATES UNEQUIVOCALLY THAT BELL SOUTH CANNOT QUALIFY FOR SECTION 271 AUTHORIZATION UNDER EITHER TRACK A OR TRACK B BECAUSE BELL SOUTH DOES NOT COMPLY WITH THE COMPETITIVE CHECKLIST.**

Actual experience of competing carriers shows that problems with OSS and other related items demonstrate that BellSouth is unable to provide interconnection, access to unbundled network elements, and resale, among other things, pursuant to the Competitive Checklist. These shortcomings, as discussed below, compel rejection under either Track A or Track B.

**A. The Competitive Checklist.**

Even if BellSouth were allowed to proceed under Track A or Track B, as BellSouth asserts, BellSouth fails to demonstrate by preponderance of the evidence that it meets *each and every item* of the Competitive Checklist under either Section 271(c)(1)(A) or Section 271(c)(2)(B).

Section 271(c)(2) requires a BOC seeking in-region, interLATA authority to meet the requirements of Section 271(c)(2)(B). In particular, a BOC must demonstrate that it is providing or offering access and interconnection which include compliance with the following items: interconnection; nondiscriminatory access to network elements; nondiscriminatory access to poles, ducts, etc.; unbundled local loop; unbundled local transport; unbundled local switching; nondiscriminatory access to 911/E911, directory assistance services, and operator call completion services; white pages directory listings; nondiscriminatory access to telephone numbers; nondiscriminatory access to databases and associated signaling; number portability; dialing parity; reciprocal compensation; and resale.

The duty to provide interconnection is subject to the requirements of Sections 251(c)(2) (interconnection at any technically feasible point on nondiscriminatory rates, etc.) and 252(d)(1) (nondiscriminatory cost-based rates); the duty to provide nondiscriminatory access to network elements is subject to the requirements of Sections 251(c)(3) (nondiscriminatory access on an unbundled basis) and 252(d)(1) (nondiscriminatory cost-based rates). The obligation to provide reciprocal compensation is subject to the requirements of Section 252(d)(2) (mutual and reciprocal recovery of costs associated with transport and termination). Finally, the resale obligation is subject to the requirements of Sections 251(c)(4) (nondiscriminatory resale at wholesale rates) and 252(d)(3) (determination of wholesale rates at retail minus avoided costs).

In addition to these statutory requirements, the Commission has previously concluded that providing nondiscriminatory access to operations and support functions is a "term and condition" of unbundling network elements under Section 251(c)(3), or resale under Section 251(c)(4).<sup>20</sup> The Commission recently reaffirmed this requirement in the

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<sup>20</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (rel. Aug. 8, 1996) (*Local Competition Order*). Specifically, the FCC concluded:

[N]ondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term and condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operation support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions.

*Local Competition Order*, at ¶ 517.

*Ameritech-Michigan Order*, and noted that in order for a BOC to demonstrate that it is providing the items enumerated in the Competitive Checklist (e.g., unbundled loops, unbundled local switching, resale services, etc.), it must demonstrate, *inter alia*, that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services.<sup>21</sup>

Similarly, the Commission previously has found that OSS and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under Section 251(c)(3).<sup>22</sup> The BOCs' obligation to provide unbundled OSS upon request under the Commission's regulations has been left intact by the United States Court of Appeals for the Eighth Circuit. In rejecting the BOCs' assertion that the Commission's decision to require the incumbent local exchange carriers ("ILECs") to provide competitors with unbundled access to OSS unduly expands the ILECs' unbundling obligations beyond the statutory requirements, the Eighth Circuit concluded that OSS and other vertical switching features qualify as network elements that are subject to the unbundling requirements of the 1996 Act. The Eighth Circuit found that:

[t]he Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B. The Act specifically provides that "[t]he term 'network element' means a facility or equipment used in the provision of a telecommunications service." 47 U.S.C.A. § 153(29). Significantly, the Act defines "telecommunications service" as meaning "the offering of telecommunications for a fee directly to the public." *Id.* § 153(46). Given this definition, the offering of telecommunications services encompasses more than just the physical

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<sup>21</sup> *Ameritech-Michigan Order*, at ¶ 132.

<sup>22</sup> *Local Competition Order*, at ¶ 316.

components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service--*the functions of operational support systems*. Such functions are necessary to provide telecommunications "for a fee directly to the public." *Id.* We believe that the FCC's determination that the term "network element" includes all the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference.<sup>23</sup>

Sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv) expressly require a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1) and to demonstrate that telecommunications services are available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3). Because the duty to provide access to network elements under Section 251(c)(3) and the duty to provide resale services under Section 251(c)(4) include the duty to provide nondiscriminatory access to OSS functions, compliance with Sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv) necessarily requires compliance with applicable OSS requirements.

**B. Compliance with OSS Requirements.**

In its recent *Ameritech-Michigan Order*, the Commission reaffirmed the importance of providing nondiscriminatory access to the BOCs' OSS. In rejecting Ameritech-Michigan's Section 271 application, the Commission reaffirmed that new entrants must have equivalent access to the functions performed by the systems, databases, and personnel--i.e., OSS--that are used by the ILECs to support telecommunications services and network elements. The Commission further reaffirmed its finding in the *Local Competition*

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*Iowa Utilities Board v. Federal Communications Commission*, Nos. 96-3321, 96-3406, et al. (8th Cir. 1997).

*Order* that, in order to meet the nondiscriminatory standard of OSS, an ILEC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers, or other carriers.<sup>24</sup>

The Commission also concluded that incumbent local exchange carriers ("ILECs") must generally provide network elements, including OSS functions, on terms and conditions that provide an efficient competitor with a "meaningful opportunity to compete."<sup>25</sup> Without equivalent access to the BOCs' OSS, the Commission found, many items required by the checklist, such as resale, unbundled loops, unbundled local switching, and unbundled local transport, would not be practically available.

The Commission has identified the following OSS requirements as the necessary preconditions to a grant of in-region, interLATA authority:

- The BOC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers or other carriers.<sup>26</sup>
- The BOC must generally provide network elements, including OSS functions, on terms and conditions that provide an efficient competitor with a meaningful opportunity to compete.<sup>27</sup>
- The BOC must provide access to OSS functions provided by the BOC to competing carriers must sufficiently support each

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<sup>24</sup> *Ameritech-Michigan Order*, at ¶ 130.

<sup>25</sup> *Ameritech-Michigan Order*, at ¶ 130.

<sup>26</sup> *Ameritech-Michigan Order*, at ¶ 130.

<sup>27</sup> *Ameritech-Michigan Order*, at ¶ 130.

of the three modes of competitive entry strategies established by the 1996 Act: interconnection, unbundled network elements, and services offered for resale.<sup>28</sup>

- The BOC must provide access to all of the processes, including those existing legacy systems used by the BOC to provide access to OSS functions to competing carriers.<sup>29</sup>
- The BOC must deploy the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and provision of assistance to competing carriers to understand how to implement and use all of the OSS functions available to competing carriers.<sup>30</sup>
- The BOC must develop sufficient electronic and manual interfaces to allow competing carriers to access all of the necessary OSS functions. For those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers.<sup>31</sup>
- The BOC must provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access.<sup>32</sup>
- The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible.<sup>33</sup>

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<sup>28</sup> *Ameritech-Michigan Order*, at ¶ 133.

<sup>29</sup> *Ameritech-Michigan Order*, at ¶ 134.

<sup>30</sup> *Ameritech-Michigan Order*, at ¶ 136.

<sup>31</sup> *Ameritech-Michigan Order*, at ¶ 137.

<sup>32</sup> *Ameritech-Michigan Order*, at ¶ 137.

<sup>33</sup> *Ameritech-Michigan Order*, at ¶ 137.



- The BOC must disclose to competing carriers any internal "business rules," including information concerning the ordering codes that a BOC uses that competing carriers need to place orders through the system efficiently.<sup>34</sup>
- The BOC must ensure that its OSS are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions.<sup>35</sup>
- The BOC must ensure that the OSS functions it has deployed are operationally ready, as a practical matter (probative evidence that OSS functions are operationally ready is actual commercial usage).<sup>36</sup>
- The OSS functions provided by the BOC to competing carriers must actually be handling current demand and will be able to handle reasonably foreseeable demand volumes.<sup>37</sup>
- For OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail services, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers, or its affiliates, in terms of *quality, accuracy, and timeliness*. Equivalent access includes comparisons of analogous functions between competing carriers and the BOC, even if the actual mechanism used to perform the function is different for competing carriers than for the BOC's retail operations.<sup>38</sup>
- For those OSS functions that have no retail analogue, such as the ordering and provisioning of unbundled network elements, the BOC must demonstrate that the access it provides to competing carriers satisfies its duty of nondiscrimination

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<sup>34</sup> *Ameritech-Michigan Order*, at ¶ 137.

<sup>35</sup> *Ameritech-Michigan Order*, at ¶ 137.

<sup>36</sup> *Ameritech-Michigan Order*, at ¶ 136.

<sup>37</sup> *Ameritech-Michigan Order*, at ¶ 138.

<sup>38</sup> *Ameritech-Michigan Order*, at ¶ 139.